



DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 981

[Doc. No. AMS-SC-17-0084; SC18-981-1 FR]

**Almonds Grown in California; Revision to the Adjusted
Kernel Weight Computation**

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule implements a recommendation from the Almond Board of California (Board) to revise the adjusted kernel weight computation currently prescribed under the Marketing Order for almonds grown in California. In addition, this action allows adjustments to the calculated percentages for foreign material, excess moisture, or inedible kernels so that the sum of the percentages for the specified measurements equals 100 percent.

DATES: Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Andrea Ricci, Marketing Specialist, or Jeffrey Smutny, Regional Director, California Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA;

Telephone: (559) 487-5901, Fax: (559) 487-5906, or Email: Andrea.Ricci@ams.usda.gov or Jeffrey.Smutny@ams.usda.gov.

Small businesses may request information on complying with this regulation by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or Email: Richard.Lower@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This final rule, pursuant to 5 U.S.C. 553, amends regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This final rule is issued under Marketing Order No. 981, as amended (7 CFR part 981), regulating the handling of almonds grown in California. Part 981 (referred to as the "Order") is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act." The Board locally administers the Order and is comprised of growers and handlers operating within California.

The Department of Agriculture (USDA) is issuing this final rule in conformance with Executive Orders 13563 and 13175. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB)

exempted from Executive Order 12866 review. Additionally, because this final rule does not meet the definition of a significant regulatory action, it does not trigger the requirements contained in Executive Order 13771. See OMB's Memorandum titled "Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, titled 'Reducing Regulation and Controlling Regulatory Costs' " (February 2, 2017).

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This final rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the

handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This final rule changes the way adjusted kernel weight is expressed by requiring calculation of percentages for specified measurements to round the decimal to the nearest thousandth rather than the current hundredth. In addition, this final rule allows adjustments to the calculated percentages for foreign material, excess moisture, or inedible kernels so that the sum of the percentages for the specified measurements equals 100 percent. The Board unanimously recommended these changes at its December 4, 2017, meeting.

Section 981.42 provides authority for quality control regulations. Paragraph (a) of that section requires that each handler shall have the inspection agency determine the percentage of inedible kernels received by that handler and report such determination to the Board.

Section 981.442(a)(1) prescribes that each handler shall have a representative sample drawn from each lot of any variety of incoming almonds that the handler receives.

Section 981.442(a)(3) prescribes that each such sample shall be analyzed by or under surveillance of the Federal-State Inspection Service (or, when specifically designated, the Federal Inspection Service) to determine the kernel content and the portion of inedible kernels in the sample. The inspection agency prepares a report showing, among other things, the total adjusted kernel weight. This report is submitted by the inspection agency to the Board and the handler.

Section 981.401(a) defines adjusted kernel weight. Section 981.401(b) provides examples of the computation that is used to determine adjusted kernel weight. This computation includes a calculation of percentages for specified measurements of edible kernels, inedible kernels, foreign material, and excess moisture. The table of examples contained in § 981.401(b) shows percentages rounded to the nearest tenth and the nearest hundredth decimal place. However, in practice, the calculated percentages are currently being rounded to the nearest hundredth decimal place.

Currently, the inspection agency utilizes a computer-based database program that computes and totals the

percentages for the specified measurements. As part of the program's computation process, it automatically makes adjustments, when needed, so that the total of the percentages equals 100 percent. This program has been used for several years, and the industry is accustomed to receiving reports from the inspection agency that show the 100-percent summed total.

In early 2017, the USDA inspection service began testing a new web-based program that will replace the computer-based program described above. During this testing, USDA discovered that, due to the rounding method used by the new program, the sum of the percentages occasionally did not equal 100 percent. It was further determined during testing that having the new program round the decimal to the nearest thousandth, rather than the nearest hundredth as currently provided in the Order, would produce more accurate results.

The new program also makes automatic minor adjustments to the percentage computations for foreign material, excess moisture, or inedible kernels so that the sum of the percentages always equals 100 percent. This allowance for automatic adjustments of these specified measurements

aligns with industry practice that has existed for many years.

As a result of these test results, the Board determined that rounding the decimal to the nearest thousandth rather than the current hundredth provides a more accurate computed percentage. In addition, allowing the program to make adjustments to the calculated percentages for foreign material, excess moisture, or inedible kernels aligns the requirements under the Order with current industry practices, ensuring the continuance of longstanding reporting practices and transparency in the program.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued

pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 6,800 almond growers in the production area and approximately 100 almond handlers subject to regulation under the Order. Small agricultural service firms are defined by the Small Business Administration (SBA) as those having annual receipts of less than \$7,500,000, and small agricultural producers are defined as those having annual receipts of less than \$750,000 (13 CFR 121.201).

The National Agricultural Statistics Service (NASS) reported in its most recent (2012) Agricultural Census that there were 6,841 almond farms in the production area (California), of which 6,204 had bearing acres. The following computation provides an estimate of the proportion of agricultural producers (farms) and agricultural service firms (handlers) that would be considered small under the SBA definitions.

The NASS Census data indicates that out of the 6,204 California farms with bearing acres of almonds, 4,471 (72 percent) have fewer than 100 bearing acres.

For the almond industry's most recently reported crop year (2016), NASS reported an average yield of 2,280 pounds per acre and a season average grower price of \$2.44 per pound. A 100-acre farm with an average yield of 2,280 pounds per acre would produce about 228,000 pounds of almonds. At \$2.44 per pound, that farm's production would be valued at \$556,320. The Census of Agriculture indicates that the majority of California's almond farms are smaller than 100 acres; therefore, it could be concluded that the majority of growers had annual receipts from the sale of almonds in 2016-17 of less than \$556,320, which is below the SBA threshold of \$750,000. Thus, over 70 percent of California's almond growers would be classified as small growers according to SBA's definition.

To estimate the proportion of almond handlers that would be considered small businesses, it was assumed that the unit value per shelled pound of almonds exported in a particular year could serve as a representative almond price at the handler level. A unit value for a commodity is the value of exports divided by the quantity. Data from the Global Agricultural Trade System database of USDA's Foreign Agricultural Service showed that the value of

almond exports from August 2016 to July 2017 (combining shelled and inshell almonds) was \$4.072 billion. The quantity of almond exports over that time period was 1.406 billion pounds, combining shelled exports and the shelled equivalent of inshell exports. Dividing the export value by the quantity yields a unit value of \$2.90 per pound. Subtracting this figure from the NASS 2016 estimate of season average grower price per pound (\$2.44) yields \$0.46 per pound as a representative grower-handler margin. Applying the \$2.90 representative handler price per pound to 2016-17 handler shipment quantities provided by the Board showed that approximately 40 percent of California's almond handlers shipped almonds valued under \$7,500,000 during the 2016-17 crop year and would therefore be considered small handlers according to the SBA definition.

This final rule revises the adjusted kernel weight computation in § 981.401 by requiring calculation of the percentages for specified measurements to round the decimal to the nearest thousandth rather than the current hundredth. In addition, this action allows adjustments to the calculated percentages for foreign material, excess moisture, or inedible kernels so that the sum of the

percentages for the specified measurements equals 100 percent. Requiring rounding of the decimal to the nearest thousandth provides for a more accurate computed percentage. In addition, allowing adjustments to the foreign material, excess moisture, or inedible kernel measurements aligns the Order with current industry practices, ensuring the continuance of longstanding reporting practices and transparency in the program. Authority for this action is provided in § 981.42(a). The Board recommended this action at a meeting on December 4, 2017.

It is not anticipated that this action would impose additional costs on handlers or growers, regardless of size. The changes are intended to align provisions of the Order with current industry practices. This final rule is not expected to change handler inspection costs, as handlers are currently required to have all lots inspected to determine kernel content.

The Board considered alternatives to this action, including not changing the current computation procedures. Prior to this recommendation, the Board's Almond Quality, Food Safety and Services Committee (Committee) reviewed the

program, surveyed handlers, and determined that not changing the computation procedures to align with current industry practices would cause disruption in the industry. Therefore, the Committee unanimously recommended this action to the Board at a meeting on November 16, 2017.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581-0178 (Vegetable and Specialty Crops). No changes are necessary in those requirements as a result of this action. Should any changes become necessary, they would be submitted to OMB for approval.

This final rule imposes no additional reporting or recordkeeping requirements on either small or large almond handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities

for citizen access to Government information and services, and for other purposes.

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this final rule.

Further, the Board's meeting was widely publicized throughout the almond industry, and all interested persons were invited to attend the meeting and participate in Board deliberations. Like all Board meetings, the December 4, 2017, meeting was a public meeting, and all entities, both large and small, were able to express their views on this issue.

Also, the Board has a number of appointed committees to review certain issues and make recommendations to the Board. The Committee met on November 16, 2017, and discussed this issue in detail. That meeting was also a public meeting, and both large and small entities were able to participate and express their views.

A proposed rule concerning this action was published in the *Federal Register* on April 20, 2018 (83 FR 17506). Copies of the rule were made available to all members of the Board and all California almond growers and handlers. Finally, the rule was made available through the internet

by USDA and the Office of the Federal Register. A 30-day comment period ending May 21, 2018, was provided to allow interested persons to respond to the proposal. No comments were received. Accordingly, no changes will be made to the rule as proposed.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <http://www.ams.usda.gov/rules-regulations/moa/small-businesses>. Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant matters presented, including the information and recommendation submitted by the Board and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 981

Almonds, Marketing agreements, Nuts, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 981 is amended as follows:

PART 981 - ALMONDS GROWN IN CALIFORNIA

1. The authority citation for 7 CFR part 981 continues to read as follows:

Authority: 7 U.S.C. 601-674.

2. In § 981.401, revise the table in paragraph (b) and add paragraph (c) to read as follows:

§ 981.401 Adjusted kernel weight.

* * * * *

(b) * * *

| | Computation No. 1 | | Computation No. 2 | |
|--|--|-----------------|--|-----------------|
| | Deliveries with less than 95 percent kernels | | Deliveries with 95 percent or more kernels | |
| | Percent of sample | Weight (pounds) | Percent of sample | Weight (pounds) |
| 1. Actual gross weight of delivery | | 10,000 | | 10,000 |
| 2. Percent of edible kernel weight | 53.000 | | 84.000 | |
| 3. Less weight loss in processing ¹ | 1.000 | | 0.000 | |
| 4. Less excess moisture of edible kernels (excess moisture × line 2) | 1.060 | | 1.680 | |
| 5. Net percent shell out (line 2 - lines 3 and 4) | 50.940 | | 82.320 | |

| | | | | |
|--|--------|-------|--------|-------|
| 6. Net edible kernels (line 5 × line 1) | | 5,094 | | 8,232 |
| 7. Percent of inedible kernels (from sample) | 12.000 | | 12.000 | |
| 8. Less excess moisture of inedible kernels (excess moisture from sample × line 7) | 0.240 | | 0.240 | |
| 9. Net percent inedible kernels (line 7 – line 8) | 11.760 | | 11.760 | |
| 10. Total inedible kernels (line 9 × line 1) | | 1,176 | | 1,176 |
| 11. Adjusted kernel weight (line 6 + line 10) | | 6,270 | | 9,408 |

¹Only applies to deliveries with less than 95 percent kernels.

(c) *Computation adjustments.* If applicable, adjustments shall be made by rounding such that the sample computation percentages total equals 100 percent. Rounding adjustments shall be made as follows: first adjust the foreign material percentage; if there is no foreign material in the sample, then adjust the excess moisture percentage; or if

there is no foreign material or excess moisture in the sample, adjust the inedible kernels percentage.

Dated: June 15, 2018.

Bruce Summers,

Administrator,

Agricultural Marketing Service.

BILLING CODE 3410-02 P

[FR Doc. 2018-13272 Filed: 6/19/2018 8:45 am; Publication Date: 6/20/2018]